

02
01-10-2019
Court No. 04
Samrat

A.S.T 40 of 2019
Plume Vapour Private Ltd. & Anr.
-Vs-
Union of India
With
A.S.T 41 of 2019
M/s Woke Vapors Pvt. Ltd.
-Vs-
Union of India & Ors.

Dr. Abhishek Manu Singhvi, sr. advocate,
Mr. Jishnu Saha, sr. advocate,
Mr. Amar Gupta,
Mr. Sanjay Ginodia,
Mr. Manoj Kumar Tiwari,
Mr. Debnath Ghosh,
Mr. Omar Ahmad,
Mr. Kamaljeet Singh,
Mr. Shwetank Ginodia,
Mr. Ashish Joshi,
Mr. Vikram Shah,
Mr. Sandeep Chilana,
Ms. Madhavi Khana

... For petitioners in AST 40 of 2019

Mr. Anindya Kumar Mitra, sr. advocate,
Mr. Soumya Roy Chowdhury,
Mr. Srijan Sinha,
Mr. Himanshu Chaubey,
Mr. Surojit Biswas,
Mr. Ritesh Ganguly,
Mr. Awani Kumar Roy

... For petitioner in AST 41 of 2019

Mr. Aman Lekhi, sr. advocate, Additional
Solicitor General,
Mr. Vipul Kundalia,
Mr. M.K. Kanoria,
Mr. M.C. Prusty,
Ms. Shradha Deshmukh,
Mr. R. Rishabh,
Mr. Yogesh Vats,
Ms. Gargi Mukherjee,
Ms. Nabanita Karmakar,
Mr. Tapas Bhanja

... For respondents.

Mr. Lekhi, learned senior advocate, Additional
Solicitor General appears on behalf of Union of India.
He submits, there were materials necessitating
issuance of the Ordinance. It is in exercise of the

President's legislative power. He refers to article 13 in the Constitution of India to submit, any challenge brought must be against the Ordinance operating as law.

He relies on judgments of Supreme Court in **Karnataka Bank Ltd. -Vs- State of A.P.** reported in **(2008) 2 SCC 254** paragraph 19 and **Ashutosh Gupta -Vs- State of Rajasthan** reported in **(2002) 4 SCC 34** paragraph 5 to submit, there is always a presumption in favour of constitutionality and discriminatory allegations in writ petition must be specific, clear and unambiguous. Specifics regarding particulars of the product, its distribution and other information in connection therewith are, according to him, absent in the petitions.

On contention of under classification, he relies on **State of M.P. -Vs- Bhopal Sugar Industries Ltd.** reported in **(1964) 6 SCR 846**, to page 850 of the report, where following was said—

“All persons who are similarly circumstanced as regards a subject matter are entitled to equal protection of the laws, but it is not predicted thereby that every law must have universal application irrespective of dissimilarity of objects or transactions to which it applies, or of the nature or attainments of the persons to whom it relates. The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute.”

On **Sakhawant Ali –Vs- State of Orissa** reported in **AIR 1955 SC 166**, paragraph 10 also on the point and an American case of **Herbert Tigner –Vs- State of Texas** reported in **310 US 141**, at page 147, from where following is extracted and set out:-

“The equality at which the “equal protection” clause aims is not a disembodied equality. The Fourteenth Amendment enjoins “the protection of the laws,” and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies.”

He relies on **Health For Millions –Vs- Union of India** reported in **(2014) 14 SCC 496**, paragraph 13 to submit, operation of statutory provisions cannot be stultified by granting an interim order, except when the court is fully convinced that the particular enactment or the rules are ex facie unconstitutional and factors like balance of convenience, irreparable injury and public interest are in favour of passing an interim order.

He submits, this is the interim stage. His client has right to reply. The consumption of e-cigarettes is to be nipped in the bud. The Government has been considering how to achieve this end. Various actions were taken, which is permissible to be taken by the Government as opposed to a Court passing judgment and being able to thereafter review it only on law conferring right to review. Attempt was made to act on treating the chemicals in e-cigarettes to be in category of drugs. That action stood stayed by judicial intervention. On query from Court he

submits, proceedings in Parliament, disclosed in the first petition, would go to show that the Government was contemplating action. On having material before it, it has acted. He submits, there should be no interference before affidavits come in and there has been hearing thereon.

Dr. Singhvi, learned senior advocate appearing on behalf of petitioners in the first petition submits, some interim measure is necessary since it has to be taken as admitted that e-cigarettes are less harmful than combustible tobacco. A verbal imagery to attach fear to the product is being made. Sufficient pleadings and disclosures, in support of the challenge, are available in the petition. He submits, standards for judicial review of an Ordinance are different from legislative action. He relies on judgment of Supreme Court (Five Judge Bench) in **Krishna Kumar Singh –Vs- State of Bihar** reported in **(2017) 3 SCC**, paragraphs 37, 50, 54, 55, 69, 105.1, 105.2, 105.13. He submits, at present there should be a direction, without prejudice to his clients' contentions, for making inventory and thereupon disposal of existing stocks.

Mr. Mitra, learned senior advocate appears on behalf of petitioners in the second petition, files supplementary affidavit on leave granted and copies served. He submits, his client also manufactures Electronic Non-Nicotine Delivery Systems (ENNDS). He submits further, since the product does not contain nicotine, there should be direction to keep that product outside purview of the Ordinance. This

submission is without prejudice to his clients' contentions.

It appears from proceedings happened in Parliament between 7th September, 2012 (in Lok Sabha as well as Rajya Sabha, relating to e-cigarettes) and 26th July, 2019 that, *inter alia*, the Government was aware of marketing of e-cigarettes and their growing popularity across the country. That it was considering regulating, including banning of it. It had issued advisories to States and Union Territories to ensure the product is not sold. Till before the issuance of the Ordinance, at least as on 10th July, 2019, the Government, it appears, had not taken a decision. In the circumstances, this Court thinks it fit to pass interim order staying operation of clause (b) under the proviso in section 5 of impugned Ordinance. As a consequence, the requirement of submission of stock, specified in the list, to be submitted to nearest office of the authorized officer, as requirement under clause (a) under said proviso, will also remain stayed. The authorized officer, if feels necessary, will verify the inventory made on list submitted. It is clarified, there is to be no disposal.

Copy of affidavit in opposition to be used, Mr. Lekhi submits, will be served on petitioners by 5th November, 2019. Copies of affidavit in reply will be accepted on adjourned date on copies thereof served in advance.

List on 14th November, 2019 marked at 2 PM.

(Arindam Sinha, J.)